HENG WOOI KIM & ANOR

v.

BAYVIEW PROPERTIES SDN BHD

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL NO: 23-179-1986]
14 JULY 1997

CIVIL PROCEDURE: *Res judicata - Whether claim by same parties on same subject estopped by previous consent judgment - Whether consent judgment extinguished/merged all claims*

CIVIL PROCEDURE: *Res judicata - Prerequisite - Circumstances when res judicata not applicable*

The plaintiffs and the defendant had entered into a contract of works whereby the plaintiffs in consideration of a sum of money, carried out earthworks for the defendant. Pursuant to the terms of the contract the plaintiffs presented to the defendant certificates for payment which should have been paid within 14 days after the presentation. By reason of non-payment of the certificates the plaintiffs filed a suit for the amount due and terminated the contract.

A consent judgment was entered into and was fully settled when several months later the plaintiffs filed another suit pursuant to certain clauses of the contract for another sum of money. The defendant raised *res judicata* on the grounds that the second suit related to the same contract of the first suit and to the same earthworks as no further earthworks were carried out by the plaintiffs after the termination of the contract. The parties in both suits were the same.

The defendant argued that the claims of the second suit could have been incorporated into the first suit and the consent judgment entered into had extinguished the second suit as the claims were based on the terms of the contract that was claimed upon by the plaintiffs in the first suit.

The plaintiffs contended that the parties had corresponded on the claims of the second suit and they were led to believe that the consent judgment had not extinguished or merged all claims. The defendant was therefore estopped from raising *res judicata.* The defendant replied that the plaintiffs had not raised that fact even though *res judicata* was argued during their application for summary judgment.

Held:

[1] An ordinary estoppel should be pleaded but estoppel *res judicata* need not be specifically pleaded.

[2] A party relying on the doctrine of *res judicata* must show either an actual merger or that the same point has already been decided between the same parties.

[3] To bar a plaintiff from recovering from the same cause of action, the circumstances must be such that the plaintiff might have recovered in a former suit that which he seeks to recover in the second.

[4] In the instant case, it was evident from the correspondence prior to the recording of the consent judgment between the parties that the first suit was a claim on the certificates for payment and it was clear to the parties that the plaintiffs were not claiming what was already claimed.

[5] Special circumstances could permit the same parties to open the same subject of litigation in respect of a matter which could have been brought forward as part of the subject in contest but was not brought forward.

[6] In the instant case, in all the correspondence between the parties, there were the customary words "without prejudice to the rights and remedies of the parties under the contract" which held out to the other that the parties' respective rights would not be affected by the consent judgment. The rights of the parties expressly preserved constitute the special circumstance which would permit the same parties to open the same subject of litigation.

[Plea of res judicata dismissed.]

Cases referred to:

Lockyer v. Ferryman [1877] 2 App CAS 519 ***(refd)***
Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd & Ors (2) [1966] 2 All ER 536 ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***
Malayan United Finance Bhd v. Noormurni Sdn Bhd & Anor [1988] 1 MLJ 395 ***(cit)***
Arnold v. National Westminster Bank plc [1991] 2 All ER 41 ***(refd)***
Henderson v. Henderson [1843] 3 Hare 100 ***(foll)***
Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd & Anor [1975] AC 581 ***(refd)***
Talbot v. Berkshire CC [1993] 4 All ER 9 ***(refd)***
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 ***(refd)***
Gleeson v. J Wippel & Co Ltd [1977] 3 All ER 54 ***(refd)***
Wong Peng Yan Benjamin v. Genting Bhd & Anor [1994] 1 CLJ 351 ***(refd)***

Mensa Mercantile (Far East) Pte Ltd v. Eikobina (M) Sdn Bhd & Ors [1991] 1 CLJ 772 ***(refd)***
Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 MLJ 494 ***(refd)***
Stephenson v. Garnett [1898] 1 QB 678 ***(cit)***
Nelson & Couch 15 CBNS 99 ***(refd)***
King v. Hoare 13 M & W 494 ***(refd)***
Re WS Bee & Co [1938] 7 MLJ 7 ***(refd)***
SK Mohamoodhu & Co [1950] 16 MLJ 244 ***(cit)***
Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman [1987] 2 MLJ 633 ***(refd)***
Brunsdun v. Humphrey 14 QBD 141 ***(refd)***
Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 MLJ 257 ***(cit)***
Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 ***(cit)***
Hong Leong Finance Bhd v. Yap Yong Seong @ Yap Eng Ching [1990] 1 CLJ 85 ***(cit)***
Malaysia Building Society Bhd v. Lim Kheng Kim & Ors [1988] 3 MLJ 175 ***(cit)***
Chuah Eng Khong v. Malayan Banking Berhad [1995] 3 CLJ 581 ***(cit)***
Andavan v. Thing Nyik Lin [1966] 1 MLJ 57 ***(cit)***
Huffer v. Allen LR 2 Ex 15 ***(cit)***
Re S American Co. [1895] 1 Ch 37 ***(cit)***
Kinch v. Walcott [1929] AC 482 ***(cit)***
Barber v. Staffordshire County Council [1996] 2 All ER 748 ***(refd)***
Kok Hoong v. Leong Cheong Kweng Mines [1964] 30 MLJ 49 ***(refd)***

Other sources referred to:
Broom's Legal Maxims, 10th Edn., p. 217
Res Judicata, Spencer-Bower & Turner, p. 18

For the plaintiffs - Louis Van Buerle (Vicknes with him); M/s. Cheong Wai Meng & Van Buerle
For the defendant - Wong Choon Wah (Wong Chee Leng with him); M/s. Skrine & Co.

JUDGMENT

Jeffrey Tan J:

When this action was called up for hearing on the appointed date, both learned Counsel, Mr. Louis Van Buerle (Mr. Vicknes with him) for the plaintiffs, and Mr. Wong Choon Wah (Miss Wong Chee Leng with him) for the defendant, informed the Court that the parties had agreed that the defendant's plea of *res judicata* be tried as a preliminary issue, as the prior resolution of that plea, so both Counsel further informed, could avoid a full trial.

For the trial of that plea, Counsel placed before the Court (i) two bundles of documents and (ii) a statement containing the following agreed facts. On 1 June 1984, the deceased and the defendant entered into a contract of works

('contract'), whereby the deceased agreed, in consideration of RM3,552,789.15 to execute certain earthworks ('earthworks') on Lot 62, Section 2 Town of Batu Ferringhi, Lots 413, 414, 450-459, 460-462, Part of 342, Mukim 17, North East District, Penang ('lots') for the defendant, upon the terms and conditions in the acceptance letter. Pursuant to cl. 30(1) of the contract, the supervising officer issued three (3) interim certificates for payment (certificates 14-16, dated respectively 27 August 1985, 2 October 1985 and 4 November 1985) to the deceased. Pursuant to the terms of the contract, the defendant should pay the sum certified for payment within 14 days after presentation of each certificate. On 8 November 1985, and by reason of the non-payment of certificates 14 & 15, the deceased terminated the said contract, pursuant to cl. 26(1) of the contract. On 26 November 1985, the deceased demanded the sum of RM440,300 due under certificates 14-16. The deceased filed suit (Penang High Court 1563/85) ('1st suit') against the defendant for the sum of RM440,300 (the 1st suit was filed on 10 December 1985). On 30 January 1986, pursuant to an application for summary judgment, a consent judgment was entered. The consent judgment has been fully settled. On 2 July 1986, the deceased filed the instant suit, claiming, *inter alia*, the following:

(i) under cl. 26(2)(i) the sum of RM585,768.48

(ii) under cl. 26(2)(iii) and (vi) RM3,783,820

(iii) general damages;

(iv) interest on the amounts found due by the defendant to the deceased under prayers 1, 2 and 3 at the rate of 8% per annum from date of realisation ie, 8 November 1985 until realisation;

(iv) costs; and

(v) further or other relief as this Honourable Court deems fit.

From the agreed facts, the following further facts were established. The deceased filed the 1st suit (on 10 December 1985) after the 16th certificate had fallen due for payment (on 18 November 1985) and after he had terminated (on 8 November 1985) the contract. The deceased terminated the contract before the 16th payment certificate was due for payment. The consent judgment in the 1st suit was entered (on 30 January 1986) before the instant suit was instituted (on 2 July 1986). The parties who entered the consent judgment in the 1st suit are the same persons as the parties in the instant proceeding in which *res judicata* is raised. Both the 1st suit and the instant action relate to the same contract, and, therefore, to the same earthworks. Presumably, no earthworks were executed by the deceased after he determined the contract.

The conditions in the contract, the pertinent parts, read as follows:

26(1) Without prejudice to any rights and remedies which the contractor may posses, if

(a) The employer does not pay to the contractor the amount due on any certificate within the period for Honouring Certificates named in the appendix to these conditions and continues such default for seven days after receipt by registered post or recorded delivery of a notice from the contractor stating that notice of determination under this condition will be served if payment is not made within seven days from receipt thereof; or

...

then the contractor may thereupon by notice by registered post or recorded delivery to the employer or architect forthwith determine the employment of the contractor under the contract; provided that such notice shall not be given unreasonably or vexatiously,

26(2) Upon such determination, then without prejudice to the accrued rights or remedies of either party or to any liability of the classes mentioned in cl. 18 of these conditions which may accrue either before the contractor or any sub-contractors shall have removed his temporary buildings, plant, tools, equipment, goods or materials or by reason of his or their so removing the same, the respective rights and liabilities of the contractor and the employer shall be as follows, that is to say:

...

(b) After taking into account amounts previously paid under this contract and the contractor shall be paid by the employer:

(i) The total value of the work completed at the date of determination.

(ii) The total value of work begun and executed but not completed at the date of determination, the value of work being ascertained in accordance with cl. 11(4) of these conditions as if such work were a variation by the Architect.

(iii) Any sum ascertained in respect of direct loss and/or expense under cll. 11(6), 24 and 33(2) of these conditions (whether ascertained before or after the date of determination).

(vi) Any direct loss and/or damage caused to the contractor by the determination.

It was an agreed fact that the 1st suit was a claim for the sums due on payment certificates 14-16. The consent judgment, naturally, would have been a settlement of the 1st suit and the claims therein. With regard to the instant proceeding, and the Court is certainly free to scrutinize the pleadings, the plaintiff pleaded, *inter alia*, in the amended statement of claim:

(a) in para. 5, that the plaintiff was instructed to commence earthworks on 20 February 1984 and to complete the same on 19 February 1985; due to delay in the giving of possession of site to the plaintiff and other delays occasioned by the defendant (see the particulars in para. 5) the plaintiff applied for an extension of time to complete the earthworks,

(b) in para. 6, that the plaintiff was granted an extension of time of 330 days to complete the earthworks, but the plaintiff suffered, by reason of the said delays, the loss and damage set out in para. 10,

(c) in para. 7, that the Supervising Officer shall issue a certificate stating the amount due to the plaintiff and the plaintiff shall be entitled to payment thereof or else to determine the contract if payment is not paid within the period specified,

(d) in paras. 8-9, that the plaintiff demanded payment for the sums due on certificates 14 & 15, and that the plaintiff terminated the contract in the manner provided in cl. 26(1)(a) of the said contract upon the defendant's default.

(e) in para. 9(a), the provisions of cl. 26(2)(b) of the contract.

(f) in para. 9(b), that the plaintiff submitted to the Supervising Officer a claim under cl. 26(2)(b),

(g) in para. 9(c), that the defendant rejected in toto the plaintiff's claim under cl. 26(2)(b).

In para. 10, the ultimate paragraph, excluding the prayers, of the amended statement of claim, the plaintiff pleaded as follows:

10 By reasons ~~reason~~ of the matter **matters** set out above, the plaintiff is entitled pursuant to cl. 26 (2b) (i) (iii) and (vi) of the said contract to:

~~(1) The sum of $585,768. 48 being under~~ clause ~~26(2)(b)(i)~~.

(1) The sum of $585,768.48 being the amount due to be paid by the defendant to the plaintiff under cl. 26(2)(b)(i).

(2) **Particulars under cl. 26(2)(b)(iii)**

a. Preliminaries and specifications	- $181,000
b. Head Office overheads	- $125,122
c. **Equipment expenses**	
i. Standing Idle	- $867,534
ii. Reduced Productivity	- $567,361
d. Personal expenses	- $78,479
e. **Finance costs**	
i. Interest in primary expenses	- $654,192
ii. Interest on overdue payment	- $28,340
f. **Loss of profit**	
i. Opportunity lost during extension	- $130,736

(3) **Particulars under cl. 26(2)(b)(vi)**

a. **Loss of Profit**	
As a result of repudiation	- $22,438
b. Redundant equipment	- $977,788
c. Loss of reputation	- $129,330
d. Preparation of expense particulars	- $21,500

	$3,783,820
	========

Mr. Wong submitted that the plaintiff should have incorporated all claims in the instant suit in the 1st suit. The consent judgment, he said, extinguished the present claim under cl. 26(2)(b)(i). When the plaintiff terminated the contract on 8 November 1985, he had to claim the payment for certificates

14-16 under cl. 26(2)(b)(i). The claim in the 1st suit was an exercise of the rights under cl. 26(2)(b)(i). When consent judgment was entered, on 30 January 1986, the instant suit merged into the consent judgment. The plaintiffs, by the institution of the instant suit, was seeking to reopen his claims.

Mr. Van Buerle contended however that the instant suit, contrary to the averment in the defence, was not the same cause of action as the 1st suit. The instant suit, he submitted, was founded on general damages arising from the termination of the contract and not on the certificates, 14-16. The legal authorities submitted by the defendant must be distinguished, he said, as they were not decisions concerning a consent judgment, as in the instant case. As for the claims in the instant suit, a certificate for payment was not issued and the claims rightly were the subject of arbitration under cl. 34 of the contract. When the 1st suit was settled, the claims in the instant suit were yet not ready for arbitration. The parties corresponded on the instant claims even after the consent judgment was entered, until 13 May 1986, and the plaintiff was made to believe that the consent judgment had not extinguished or merged all claims. That conduct estopped the defendant from raising *res judicata*. On 2 June 1986, the plaintiff submitted the details of the instant claims. On 3 June 1986, the defendant rejected those claims. Even the retention sum was not paid, Mr. Van Buerle added.

Mr. Wong replied as follows. The plaintiff was in a position to file all claims on 10 December 1985. When the 1st action was filed, all claims should have been incorporated. The point that the conduct of the defendant estopped the defendant from raising the plea of *res judicata* was not raised by the plaintiff during the hearing of the plaintiff's application for summary judgment, even though *res judicata* was argued before the learned Senior Assistant Registrar.

It is a rule of law, *nemo debet bis vexari pro una et eadem causa*, that a man shall not be twice vexed for one and the same cause. "If an action be brought, and the merits of the question be discussed between the parties and the final judgment obtained by either, the parties are concluded and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the 1st trial which would have led to a different judgment. In such a case, the matter in dispute having passed in *rem judicatam*, the former judgment, while it stands is conclusive between the parties, if either attempts, by commencing another action, to re-open that matter" [*Broom's Legal Maxims* (10th Edn.) p. 217].

It means, on a matter in dispute having passed in *rem judicatam*, that the parties and their privies are not permitted, by an estoppel *per rem judicatam*, to litigate once more the matter adjudged *(res judicata)*.

"The object of the rule of *res judicata* is always put upon two grounds – the one public policy, that it is in the interest of the state that there should be an end to litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause" (*Lockyer v. Ferryman* [1877] 2 App. CAS. 519, per Lord Blackburn).

Lord Guest, in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. & Ors.* (2) [1966] 2 All ER 536 at p. 564 paraphrased the doctrine of *res judicata per rem judicatam* as follows:

> The doctrine of estoppel *per rem judicatam* is reflected in two Latin maxims, (i) interest *rei publicae ut sit finis litium* and, (ii) *nemo debet bis vexare pro una et eadem causa*. The former is public policy and the latter is private justice. The rule of estoppel by *res judicata*, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy to such litigation as against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (Spencer-Bower on *Res Judicata* p. 3).

There are two kinds of estoppel *per rem judicatam*. The first type relates to cause of action estoppel and the second to issue estoppel, which is a development from the first type (*Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 MLJ 189, per Peh Swee Chin FCJ), and issue estoppel can arise even where a plea of *res judicata* cannot be established because the causes of action are not the same (*Malayan United Finance Bhd. v. Noormurni Sdn. Bhd. & Anor*. [1988] 1 MLJ 395).

The doctrines/terms, *per rem judicatam*, cause of action estoppel, issue estoppel and privies have all been judicially explained.

On cause of action estoppel, Lord Keith opined in *Arnold v. National Westminster Bank plc* [1991] 2 All ER 41 as follows:

> Cause of action estoppel arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened.

Lord Guest, who described *res judicata* in its true and original form as "cause of action estoppel", defined issue estoppel as follows:

> This has long been recognised as operating as a complete bar if the necessary conditions are present. Within recent years the principle has developed so as to extend to what has now been described as issue estoppel, that is to say where in a judicial decision between the same parties some issue which was in controversy between the parties and was incidental to the main decision has been decided then that may create an estoppel *per rem judicatam.*

The statement of principle generally regarded as the *locus classicus*, was set out by Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100 at 114-115:

> ... I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

That statement of principle has been applied in countless cases.

In *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.* [1975] AC 581, Lord Kilbrandon, delivering the judgment of the Court, said that there is a wide sense in the doctrine of *res judicata:*

> But there is a wide sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson* ...

That rule in *Henderson* is in two parts. "The first relates to those points which were actually decided by the Court; this is *res judicata* in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of *res judicata* but rather is founded upon the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation": *Talbot v. Berkshire CC* [1993] 4 All ER 9 at p. 13, [1994] QB 290 at p. 294, per Stuart-Smith LJ; see also *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor.* [1984] 2 MLJ 105.

Peh Swee Chin FCJ further explained, in *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd. (supra),* that the words "exercising reasonable diligence" in *Henderson:*

> (i) "do not necessitate a mental exercise of making a finding as to whether there was diligence, or reasonable diligence ..."
>
> (ii) are "to be understood as a gentle rebuke for the failure" to bring at the previous trial the issues that should have been brought "despite the fact that the party had the opportunity of bringing forward all such issues or asserting all such causes of action",
>
> (iii) "are not meant to impose a pre-condition for applying the doctrine of *res judicata* but are meant to say that the non-bringing of the issues would count in any event irrespective of whether the failure was or was not deliberate or due to inadvertence or negligence."

And in *Arnold v. National Westminster Bank (supra),* the House of Lords held that the further relevant material which a party would be permitted to bring forward in the later proceedings, depending on the circumstances of each case, is not confined to matters of fact but could include a change in the law.

Megarry VC in *Gleeson v. J Wippel & Co. Ltd.* [1977] 3 All ER 54, expounded "privity" in the following terms:

> Privity for this purpose is not established merely by having "some interests in the outcome". So far as they go, I think these authorities go some way towards supporting the contention of Counsel for the plaintiff that the doctrine of privity for these purposes is somewhat narrow, and has to be considered in relation to the fundamental principle *nemo debet bis vexari pro una et eadem causa* ... a successful defence is no bar to a plaintiff suing a third party unless there is sufficient degree of identity between the two to make it just to hold that the decision to which one was party should be binding in proceeding to which the other is party.

Certainly, that degree of identity was sufficient in *Wong Peng Yan Benjamin v. Genting Bhd. & Anor.* [1993] 3 MLJ 713, where the defendant in the 1st suit was the registrar of the defendant in the 2nd suit, and the plaintiff who obtained relief against the defendant in the 1st suit was estopped from bringing the principal to Court for similar relief, as the liability of the agent and principal, so the Court held, was merged and the plaintiff having opted to leave the principal out of the 1st suit was estopped from seeking similar relief in a 2nd suit.

However, with respect, that could not be said of *Mensa Mercantile (Far East) Pte. Ltd. v. Eikobina (M) Sdn. Bhd. & Ors.* [1991] 2 MLJ 258, as the "privity of interest" between the defendants in the 1st and 2nd suits, and the Court pinned it on the plaintiff's knowledge that the goods in question were intended for the defendant in the 2nd suit and that the directors of both defendants (both corporates) were common, was too tenuous to have been the sufficient identity articulated in *Gleeson v. J Wippel* as would be just, in relation to the fundamental principle *nemo debet bis vexari pro una et eadem causa,* that the decision in the 1st suit should be binding in the 2nd suit.

"Any party who is desirous of setting up *res judicata* by way of estoppel, where he is relying on such *res judicata* as a bar to his opponents claim or as a foundation of his own and who has taken the preliminary steps required in order to qualify him for that purpose" [Spencer-Bower & Turner on *Res Judicata* (2nd Edn.) p. 18] has the burden of proving the following six *probanta*:

(i) that the alleged judicial decision was what in law is deemed such;

(ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;

(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;

(iv) that the judicial decision was final; [*Kandiah Peter v. Public Bank Bhd.* [1994] 1 MLJ 119]

[see also *Cheng Hang Guan & Ors. v. Perumahan Farlim (Penang) Sdn. Bhd. & Ors.* [1993] 3 MLJ 352, where Edgar Joseph Jr SCJ held that the dissolution of an interlocutory injunction does not constitute *res judicata* or issue estoppel in determining the issues finally]

(v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;

(vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised [see *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman* [1987] 2 MLJ 633], or their privies, or that the decision was conclusive *in rem.*

But an estoppel *res judicata per rem judicatam* need not be specifically pleaded (see *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd. (supra); Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] 1 MLJ 494) as "... public policy that there should be finality in litigation is more

vigorous in excluding evidence and need not be pleaded, unlike an ordinary estoppel which should be pleaded" *(Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd. (supra))* and as the Court possesses the inherent jurisdiction of preventing an abuse of process (*Stephenson v. Garnett* [1898] 1 QB 678; *Superintendent of Pudu Prison v. Sim Kie Chon (supra)*).

Lord Guest, who stated in his judgment in *Carl-Zeiss-Stiftung* that the principle of *res judicata* has developed to what is now known as "issue", reaffirmed the following as the requirements of an issue estoppel:

> The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final: and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

A party who relies upon the doctrine of *res judicata* "must show either an actual merger or that the same point has already been decided between the same parties" (per Willies J in *Nelson & Couch* 15 CBNS 99).

The doctrine of merger was thus stated in *King v. Hoare* 13 M & W 494 at p. 504:

> If there be a breach of contract, or wrong done, or any other cause of action by one against the other, and judgment is recovered in a Court of record, the judgment is a bar to the original cause of action, because it is hereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, transit in *rem judicatam:* the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true, where there is but one cause of action, whether it be against a single person or several. The judgment of a Court of record changes the nature of that cause of action, and prevents it being the subject of another suit, and the cause of action, being single, cannot be afterwards divided into two.

Horne J in *Re WS Bee & Co.* [1938] 7 MLJ 7 was more succinct – "when a judgment is recovered the remedies for the original debt are in general merged in the judgment" – as was the Court of Appeal, in *SK Mohamoodhu & Co.*, [1950] 16 MLJ 244, where it held that the effect of a judgment is that the original debt dissappears and a fresh debt is created with different consequences.

Zakaria Yatim J (as he then was) in *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman* [1987] 2 MLJ 633 at p. 642 expressed it as follows:

> When a judgment has been given in an action, the cause of action in which it was given is merged in the judgment and its place is taken by the rights created by the judgment, so that a second action may not be brought on that cause of action. There will be no merger unless the cause of action is the same in both actions; *Halsbury's Laws of England* (4th Edn.) Vol. 26 para. 274.

"The question whether a defendant is being vexed again for the same cause of action depends not upon technical considerations but upon substance" (*Brunsdun v. Humphrey* 14 QBD 141). Perhaps it was on that test (it was in *Brunsdun*) that a different cause of action was found in the following cases:

(a) *Brunsdun v. Humphrey (supra)* – The defendant damaged the plaintiff's cab and also caused him personal injuries by the same act of negligence. Having sued for and recovered damages in respect of the cab the plaintiff sued again for the personal injuries. The majority in the Court of Appeal, applying the above test, held that the 2nd action was not barred. While fully recognising the rule that where there is but one cause of action damages must be assessed once for all, they considered that, since two distinct rights of the plaintiff had been infringed, he had a separate cause of action in respect of each of those rights;

(b) Nelson & Couch 15 CBNS 99 - at p. 109) – The defendant's ship having negligently run down the plaintiff's ship at sea, the plaintiff, by proceeding *in rem* in admiralty, obtained a sale of the defendant's ship and received the sum thereby realised; but as this sum only compensated him only for a portion of his loss, he then brought a common law action for damages for the recovery of the residue, and it was held that the admiralty decree was not a bar to the action;

[*Contrast with Conquer v. Boot* [1928] 2 KB 336 – An action was brought, and damages recovered, for breach of contract to build a bungalow in a good and workmanlike manner; the defendant successfully set up the plea of *res judicata* in answer to a second action on same contract, alleging other defects or similar character, of which the plaintiff was ignorant at the time of the first action]

(d) *Isaacs & Sons v. Salbstein and Another* [1916] 2 KB 139 – if the liability is joint, there is only one cause of action, and that becomes merged with the judgment; if the liability is several, there are two causes of action and there is no merger by reason of the judgment;

(e) *Goldrei, Foucard and Son v. Sinclair* [1918] 1 KB 180 – an action for recission of an agreement against a company in which fraud was not a necessary element and an action for fraud against other defendants were two causes of action;

(f) *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Esme Osman (supra)* – breach of contract and breach of fiduciary duty are two different causes of action;

(g) *Chan Yuow Seng v. Ling Ong Hua* [1995] 2 MLJ 580 – an application grounded on trespass under O. 89 of the Rules of the High Court 1980 is not the same cause of action as a subsequent action grounded on a terminated tenancy.

It could be pointed out though, that the doctrine of merger has no application to proceedings to enforce a charge (*Malaysian International Merchant Bankers Bhd. v Dhanoa Sdn. Bhd.* [1988] 1 MLJ 257), to foreclosure proceedings (*Kandiah Peter v. Public Bank Bhd.* [1994] 1 MLJ 119) to a guarantee under a charge (*Hong Leong Finance Bhd. v. Yap Yong Seong @ Yap Eng Ching* [1990] 1 CLJ 85), to an independent covenant which is not merged or extinguished by the judgment obtained upon the principal covenant (*Malaysia Building Society Bhd. v. Lim Kheng Kim & Ors.* [1988] 3 MLJ 175; *Chuah Eng Khong v. Malayan Banking Berhad* [1995] 3 AMR 2331) OR to a proceeding dismissed on a technicality without judicial determination of the matter directly (*Andavan v. Thing Nyik Lin* [1966] 1 MLJ 57).

A judgment by consent, or by default (*Huffer v. Allen* LR 2 Ex 15), however, raises an estoppel no less than does a judgment which results from a decision of the Court after a matter has been fought out to the end (*Re: S. American Co.* [1895] 1 Ch 37). "Their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order ... was a consent order" – per Lord Blanesburgh, delivering the advice of the Privy Council in *Kinch v. Walcott* [1929] AC 482 at p. 493.

On a decision without evidence, the English Court of Appeal, in *Barber v. Staffordshire County Council* [1996] 2 All ER 748, observed as follows:

> It is true that no evidence was heard by the tribunal but that fact does not prevent the decision operating by way of *res judicata*. In *SCF Finance Co. Ltd. v. Masri* [1987] 1 All ER 194, [1987] QB 1028 the Court of Appeal considered the earlier decision in *Khan v. Goleccha International Ltd.* [1980] 2 All ER 259, [1980] 1 WLR 1482, where it had been held that an express admission and a subsequent order by consent could give rise to an issue estoppel. The Court continued:
>
> > The decision in *Khan's* case makes it clear that an order dismissing proceedings is capable of giving rise to issue estoppel even though the Court making such order has not heard argument or evidence directed to the merits ... If a party puts forward a positive case, as the basis of asking the Court to make the order which that party seeks, and then at trial declines to proceed and accepts that the claim must be dismissed,

> then that party must, in our view, save in exceptional circumstances, lose the right to raise again that case against the other party to those proceedings. (See [1987] 1 All ER 194 at 208, [1987] QB 1028 at 1047).

However, it was the considered view of the Privy Council, per Viscount Radcliffe, in *Kok Hoong v. Leong Cheong Kweng Mines* [1964] 30 MLJ 49, that where a judgment by default comes in question it would be wrong to apply the full vigour of any principle as widely formulated as that of *Henderson*;

> It may well be doubted whether the learned Vice-Chancellor (Wigram VC) had in mind at all the peculiar circumstances of a default judgment and whether such a judgment would not naturally fall into his category of 'special cases'. In any event it is clear from what has been said on other authorities more immediately directed to the point that such a more restricted operation must be given to any estoppel arising from a default judgment.

Finally, even though the cause of action is the same, yet to constitute a formal recovery a bar "the circumstances must be such that the plaintiff might have recovered in a former suit that which he seeks to recover in the second" (per Willes J in *Nelson & Couch* 15 CBNS 99 at p. 109).

Clause 30 of the contract, read together with the appendix, provided for the defendant's retention of 10% of the value certified for payment. It also provided that the total sum retained shall be released upon the expiration of the defects liability period (which was 12 months) or on the issue of the certificate of completion of making good defects, whichever was the later. It was not submitted that the plaintiff was issued with a certificate of completion of making good defects; that being the case, the total sum retained was due and payable to the plaintiff, since the plaintiff determined the contract on 8 November 1985 and since a certificate for payment of the sum retained was payable within 14 days from the date of issuance, on 22 November 1986 (it being 12 months from 8 November 1985 plus 14 days). Therefore, on 10 December 1985, the plaintiff could not have incorporated in his 1st suit a claim for the retention sum. And even on 30 January 1986, when the consent judgment was recorded, the plaintiff could not have recovered in the 1st suit, since it was not due, the rentention sum claimed in the instant suit.

With regard to the rest of the claims in the instant suit, and it is the substance that is material:

> (a) the claim for the sum of RM585,768.48 (less the retention sum) was not for the total value of works executed but the balance work as yet not certified when the contract was determined, which would have been executed before the contract was determined on 8 November 1985,

(b) the claim for preliminaries and specifications (RM181,000), head office overheads (RM125,122), equipment standing idle (RM867,534) and reduced productivity (RM567,361), personal expenses (RM78,479), interest in primary expenses interest (RM654,192), interest on overdue payment (RM28,340), and loss of profit occasioned by the delay (RM130,736), all claimed as direct losses/expenses by reason of the determination of the contract, which would have been suffered or incurred prior to the determination of the contract,

(c) the claim for the loss of profits, to wit, "as a result of repudiation" (RM22,438), redundant equipment (RM977,788), loss of reputation (RM129,330), preparation of expense particulars (RM21,500), which could have been computed prior to the institution of the 1st suit,

with some diligence, could have been incorporated into the 1st suit. It is undoubtedly true that the plaintiff is not claiming what was already claimed in the first suit. What is claimed in the instant suit is that which was not claimed in the 1st suit. Yet that alone could not and would not resist the plea of *res judicata*, as a defendant is not to be twice vexed if one action could have recovered, if the plaintiff had brought forward his entire case, all that is claimed in multiple actions. Was it not an abuse of process therefore to have raised in the instant suit what should have been litigated in the 1st suit?

It has already been said that a consent judgment was entered on 30 January 1986. With that consent judgment, the matter in dispute in the 1st suit passed *in rem judicatam*, and the plaintiff was not permitted, by an estoppel *per rem judicatam*, to litigate once more the matter adjudged *(res judicata)*. Would the remedies, since the cause of action was single and could not be divided into two, have dissappeared?

The plaintiffs protested that they were led to believe that the consent judgment had not extinguished or merged all claims. Whether the plaintiffs were indeed led to that belief is best settled by an examination of the correspondence between the parties, for the period before and after the consent judgment.

(a) On 29 November 1985 (by then the plaintiff had determined the contract) the defendant notified the plaintiffs that unless the plaintiffs "recommence works ... we reserve our rights to terminate the contract and claim all consequential loss which we may suffer against you.

(b) On 6 December 1985, the plaintiffs replied that they had already terminated the contract and notified furthermore that they had arranged for a third party's survey of the value of earthworks executed.

(c) The plaintiffs proposed, by letter of 18 December 1985, that the damages suffered by the plaintiffs – on account of the "loss of profits", "redundancy of plant", "loss in planned recovery of overheads" and "other

damages which we are entitled" – be resolved; the plaintiffs notified furthermore that they would commence arbitration proceedings if the defendant would not respond to their letters.

(d) On 13 January 1986, the Supervising Officer (SO) notified both parties that a site inspection would be carried out on 22 January 1986 to "identify any work and/or material defects to date"

(e) On 23 January 1986, the SO notified the plaintiffs of the defects uncovered "without prejudice to the rights and remedies of the parties under the contract".

It is evident therefore that the parties prior to the entry of the consent judgment, and reasonably, each would have known that the 1st suit was a claim on certificates 14-16, had made it clear to the other that certificates 14-16 was not the only matter in dispute. The SO, and he would have been the agent of the defendant, plainly said that the defects were listed "without prejudice to the rights and remedies of the parties under the contract".

That each party, even after the consent judgment was entered, retained rights to claim against the other is evident even from the correspondence from the correspondence from the defendant/SO.

(f) On 3 February 1986, the defendant listed out further alleged defects to the SO.

(g) On 20 February 1986, the SO forwarded the defendant's letter of 3 February 1986 to the plaintiffs; the SO's letter began with the words, "without prejudice to the rights and remedies of the parties under the contract".

(h) On 27 February 1986, the defendant informed the plaintiffs that they could not understand the plaintiffs' claims.

(i) On 7 March 1986, the SO requested an "an-built topographical survey drawing of the project site together with your final claim with respect to your work carried out on site" from the plaintiffs; by two other letters of even date, the SO instructed the plaintiff to rectify certain "defects" and forwarded two sets of inventory of defects uncovered to the plaintiffs. All three letters began with the words, "without prejudice to the rights and remedies of the parties under the contract".

(j) On 10 March 1986, the plaintiffs reminded the SO that he was under a duty to certify impartially the expenses due to the plaintiffs.

(k) On 20 March 1986, the SO listed out further alleged defects, and instructed the plaintiffs to carry remedial works.

(l) On 22 March 1986, the plaintiff disputed, *inter alia*, the alleged defects.

(m) On 10 April 1986, the SO granted access to the site to the plaintiffs to carry out remedial works, and requested for a programme of works from the plaintiffs.

(n) On 10 April 1986, the plaintiffs forwarded drawings of the site immediately after the determination of the contract and specified the nature of their final claim to the SO.

(o) On 19 April 1986, the SO notified the plaintiffs that the defendant would employ a third party to rectify the defects specified in letter of 10 April 1986 if those defects were not rectified by the plaintiffs.

(p) On 25 April 1986, the plaintiffs agreed to carry out the remedial works "without prejudice to the determination of our employment and the rights arising therefrom".

(q) On 29 April 1986, the SO forwarded a sketch of the location of the required remedial works to the plaintiffs. By another letter of even date, the SO noted that the plaintiffs had agreed to complete remedial works by 6 May 1986. By a 3rd letter of even date the SO instructed the plaintiffs to execute further remedial works.

(r) On 12 May 1986, the plaintiffs complained to the SO that the plaintiffs' letters have not been answered and that the SO had not issued certificates for the balance work and for the loss and damages.

(s) On 13 May 1986, the SO complained to the plaintiffs that the plaintiffs' final claim had been divided into five categories, and requested for a "complete final claim" failing which the plaintiffs' claim in Appendix A of the plaintiffs' letter 10 April 1986 would be "taken as the final claim under the contract".

(t) On 13 May 1986, the SO reminded the plaintiffs that the valuation would be carried out after the plaintiffs had effected the repairs and that a site valuation and measurement would be carried out on 15 and 16 of May 1986.

(u) On 19 May 1986, the plaintiffs reminded the SO of his duty to certify all sums due for payment to the plaintiffs, and requested his prompt certification.

(v) On 19 May 1986, the plaintiffs informed the SO that the plaintiff had completed the remedial works, to the extent of their obligations.

(w) On 29 May 1986, the SO requested the plaintiffs' cooperation "to aid us in performing our duties and obligations under the contract".

(x) On 2 June 1986, the plaintiffs submitted a claim of RM3,783,820 together with the particulars to the SO.

(y) On 3 June 1986, the SO, rejected, only that time with the prose and diction of a legal draftsman, the plaintiffs' claim.

And each time the SO wrote to the plaintiffs, he begun with his customary "without prejudice to the rights and remedies of the parties under the contract". Unquestionably, so said on a balance of probabilities, both parties conducted themselves and held out to the other, before and after the consent judgment, that the parties' respective rights on the determination of the contract would not be affected by the consent judgment but would be preserved. The plaintiffs raised the claims in the instant suit before and after the consent judgment, whilst the defendant responded in manner wholly consistent with the consent judgment having not extinguished and or merged all claims. Most vivid was the defendant's "without prejudice to the rights and remedies of the parties under the contract" demand to the plaintiffs to execute remedial works, and the plaintiffs' notice that they were executing the remedial works "without prejudice to the determination of our employment and the rights arising therefrom". That is besides the SO's request to the plaintiffs' for their final claim, and the valuation of works even after the consent judgment, which belie any conclusion that the parties had not kept alive and or preserved the right to the claim and counterclaim in the instant suit. The only reasonable conclusion is that the parties intended that each party retains, even after the consent judgment was entered, a right to claim against the other.

In *Henderson v. Henderson*, Wigram VC stated that special circumstances could permit the same parties to open the same subject of litigation in respect of a matter which could have been brought forward as part of the subject in contest, but was not brought forward. In the instant case, there was that special circumstance where the plea of *res judicata* does not apply. The rights of the parties, albeit the consent judgment, were expressly preserved, and it would be iniquitous to drive the plaintiffs from the judgment seat.

Accordingly, the defendant's application, on the plea *res judicata* to strike out the plaintiffs' claim is dismissed with costs in the cause.

Reported by Michele Saw